A TRUSTEE MAY NOT SET OFF A GAIN IN ONE TRANSACTION AGAINST A LOSS IN ANOTHER.

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THE above rule of equity is discussed with great clarity by Hanbury in his *Modern Equity*[1] and by Underhill in his *Law of Trusts and Trustees*.[2] Hanbury gives this apt illustration: If A holds a dog and a cat on trust for B, and in breach of trust loses the cat, it will be no answer to B's claim to produce the dog and a litter of puppies. This rule is said to operate only where the gain results from a different transaction to that in which the loss occurs. "Where there is only one transaction equity simply watches (it) through all its vicissitudes and adjusts accounts according to the final result."[3] It is submitted with respect, however, that in their discussion of the two cases *Dimes* v. *Scott*[4] and *Vyse* v. *Foster*[5] bearing on this topic, the above authors are less satisfactory; that in particular with respect to *Dimes* v. *Scott* both give a wrong account of the facts, and that Underhill is thereby led to cast unjustified doubts on *Dimes* v. *Scott,* while Hanbury's defence of that case is made to involve a *non sequitur.*

The facts in *Dimes* v. *Scott*[4] were as follows:—A trustee held East India stock to the value of £2,000, part of the residue of an estate of which he was executor, on trust to convert the same, invest in Consols or real securities, and hold them in trust for B for life with remainder to C. The Trustee did not convert the stock, but held it for several years, during which it earned dividends at the rate of 10% per annum. He paid the whole of these dividends to the tenant for life. The period of the loan expiring, the Trustee then received from the East India Company the full sum of £2,000, for which he could originally have sold the stock. On investing this amount in Consols he obtained some £800 more Consols than the estate would have had if he had sold the East India Stock a year from the death of the testator and then invested it in Consols.

Needless to say, neither B nor C were likely to complain about the gain of £800 which accrued to the estate through the Testator's breach of trust in not converting within a year of the testator's death. What the remainderman C could and did complain about was that the Trustee had committed a breach of his duty to act impartially between the beneficiaries, in that he had paid to the tenant for life the whole of the income from an unauthorized investment, whereas he should have paid only the income which the estate would have been getting it if consisted of proper investments, to wit 3% per annum. The difference should have been accumulated for the remainderman. The Court upheld this contention, and directed that the Trustee would have to pay to the remainderman the difference between what B would have received up to the date of conversion

1. p. 318.
2. 8th Edn., p. 480.
3. Hanbury, *op. cit.*, p. 320.
4. 4 Russ. 195.
5. L.R. 7 H.L. 318: 8 Ch. App. 309.

of the East India stock if it had been converted and invested in Consols and what she had in fact received (a difference of roughly 7% per annum). The Trustee claimed to set off against this liability the gain of £800 odd which the estate had acquired as mentioned above, but the Court had no difficulty in deciding that he could not do this. The Plaintiff remainderman was not complaining about a loss caused by an unauthorized investment (as was the case in *Fletcher* v. *Green*[6]) but about an improper division of the trust income. Hence the breach complained of was an entirely different thing from the breach in which the gain to the estate had occurred, and the "double transaction" rule, as Hanbury rightly says (and as Underhill wrongly doubts) was properly applied.

Hanbury's mistake with respect to this case lies in his extraordinary assertion[7] that the loss was caused by the Trustee having had "to buy more funds than he would have had to buy if the conversion had taken place a year from the testator's death." This circumstance was actually the source of the gain of which the Trustee tried to claim the benefit. It was not that he *had* to buy, but that he was *able* to buy more bonds. Since Hanbury has thus interpreted the circumstances establishing the gain, he is hard put to it to say where any other gain did occur, and in the result his account of the case becomes almost meaningless. Underhill[8] rightly states that a gain to the estate resulted from the purchase of Consols at a cheaper rate than would have been possible at a year from the death of the Testator. But he quite wrongly says that loss occurred because East India stock depreciated. No such thing happened. The trustee received his full £2,000 when the stock was redeemed, and there was no evidence that any more would have been obtained a year from the death of the Testator. If the facts had been as stated by Underhill, it would indeed have been difficult to reconcile *Dimes* v. *Scott* with *Fletcher* v. *Green*. Underhill, however, is better than Hanbury in that he draws a logical conclusion from the facts wrongly stated by him, whereas Hanbury's conclusion has no apparent relation to his own version of the facts.

With respect to *Vyse* v. *Foster* it is submitted that that case should not be used at all as an authority on the rule now under discussion. The greater part of that case was taken up with discussing a difficult question as to the extent of a beneficiary's right to trace trust moneys into a partnership business. At the very end of the opinion of James L.J.[9] there is a short discussion of the following facts. The trustees had used money held by them as part of a mixed fund to build a house on land which was another part of the same mixed fund. James L.J. considered that it was by no means clear that any loss to the estate had resulted, or whether the action of the trustees had constituted a breach of trust. But in any case the trustees offered to take the land and the house and to pay to the estate an amount which

6. 33 Beav. 426.
7. *Op. cit.*, p. 319.
8. *Op. cit.*, p. 480.
9. 8 Ch. App., at 336-337.

would more than restore what had been lost, if anything had been lost. Hence the beneficiaries were in the position of having to elect to take to the property or to take a payment from the trustees—see *Thornton* v. *Stokill.*[10] The House of Lords on appeal barely mentioned this point, and adopted without comment the remarks of James L.J. Of course, if a trustee thinks that a breach of trust has improved trust property, and beneficiaries complain that the very same breach of trust has depreciated it, no dispute can possibly arise; the trustee will cheerfully pay to the beneficiaries what they claim and keep the result of his alleged breach of trust, and everyone will be happy. For this reason it is submitted that *Vyse* v. *Foster,* while it might well be cited as an instance of the operation of *Thornton* v. *Stokill,* has no relevance to the problem raised by *Dimes* v. *Scott.*

10. 1 Jur. N.S., 751.